In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 278

CHESTER WILLIAM STUPAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. 12) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1965. The petition for a writ of certiorari was filed on June 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in precluding a collateral inquiry designed to impeach the credibility of a government witness by demon-

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strating that his personal expenditures exceeded his legitimate personal income.

2. Whether, in a prosecution for willful failure to pay the special wagering tax, where the government established that no wagering tax return had been filed for petitioner, the government was also required to show as part of its case in chief that no return had been individually filed by petitioner's partner.

3. Whether the trial court abused its discretion in determining that a mistrial was not necessitated by the exposure of two jurors to newspaper accounts of the trial.

STATEMENT

Petitioner was convicted after a jury trial of willful failure to pay the wagering tax imposed by 26 U.S.C. 4411, in violation of 26 U.S.C. 7203. He was sentenced to imprisonment for four months, was fined $2,500 and costs, and was placed on probation for two years (R. 4a).[1] The court of appeals affirmed per curiam.

The evidence showed that in 1951 petitioner was informed by an Internal Revenue Officer that if he was engaged in the numbers business he was required to pay the special wagering tax (R. 13a–14a). In February, 1957, John James, a Pittsburgh police officer assigned to investigate violations of the Pennsylvania lottery laws (R. 47a–48a), met petitioner and Henry Katz at the latter's request (R. 42a–43a,

[1] "R. —" references are to petitioner's Appendix in the Court of Appeals.

157a), after securing approval and instructions from the Superintendent of Police (R. 48a). During the meeting, petitioner and Katz disclosed that they were engaged in the operation of a numbers business (R. 45a–46a), the profits from which were divided between them (R. 95a, 119a, 161a) and told James the names and locations of some of their employees (R. 45a–47a). They offered James $300 a month to refrain from raiding the locations in which they were interested (R. 49a). Petitioner paid James $300 that evening (R. 50a) and a total of $1,350 thereafter (R. 51a–53a, 56a–58a, 122a). All of the payments were turned over by James to a superior (R. 51a–53a, 120a, 123a). Some of the specified locations were raided by the police and current dated numbers slips were found (R. 25a–27a, 29a–30a, 35a–37a, 40a–42a, 54a, 162a). Internal Revenue Service records indicated that for the period in question no special wagering tax return had been filed for petitioner (R. 9a–11a).

During the cross-examination of James, petitioner's counsel sought to question him concerning his income (R. 144a–145a) and cash purchases he had made (R. 99a–100a). Out of the hearing of the jury, counsel explained he intended to show that James had made large personal expenditures in excess of an amount which might be expected from his income (R. 101a–102a, 105a–107a, 149a), that the expenditures indicated James had received more bribe payments from petitioner and others than he had reported and delivered to his superiors (R. 101a, 104a, 148a), and that this impugned James' credibility (R. 102a,

146a, 148a) and demonstrated a motive to testify falsely (R. 102a). The government stated that it would have no objection to questions concerning whether James had accepted bribes (R. 104a, 149a) but objected to any collateral attempt to prove misconduct by a comparison of income and expenditures (R. 102a, 104a, 107a, 149a). The objections were sustained (R. 108a, 147a–148a). The court held that petitioner would not be permitted to attack the credibility of the witness by scrutinization of all of his financial transactions and by attempts collaterally to show specific matters for which he had not been convicted (R. 147a). Subsequently, petitioner's counsel made offers of proof concerning certain of James' expenditures to which his proposed witnesses could testify (R. 163a–164a, 166a–167a).

After the government rested its case, petitioner's counsel argued that co-partners are liable for only one special tax between them under 26 U.S.C. 4902, and that the government had failed to establish that petitioner's partner, Katz, had not paid the tax on behalf of the enterprise.[2] The government moved to reopen its case to resolve any question on the matter but the court denied the motion (See Pet. 6). In its opinion denying petitioner's later motion for a judgment of acquittal, the court held that the government did not have the burden of establishing in its case in chief

[2] Katz had, in fact, been convicted for willful failure to pay the special tax for the same period. *United States* v. *Katz*, 332 F. 2d 422 (C.A. 3). Petitioner and his attorney were aware of this ~~conviction~~ CONVICTION (*e.g.*, R. 70a, 72a, 74a).

that the tax owed by petitioner had not been paid by someone else, but that this "was a matter of defense and the government's evidence in this respect was sufficient" (R. 180a).

On the morning of the second day of trial petitioner's counsel disclosed to the court that a short article concerning the trial had appeared in a local newspaper the previous evening, and that another such article had appeared that morning (R. 59a, 63a–64a, 172a–175a). Counsel complained that the articles referred to petitioner as a former "numbers baron" and "numbers operator," and that one of them mentioned an earlier conviction of Katz (R. 64a). The government stated that it had no part in publishing the stories (R. 65a). The court did not interrogate the jurors separately as suggested by the defense (R. 64a–65a) but instead, asked the assembled jurors whether any of them had read either or both of the articles (R. 66a). Two jurors raised their hands (R. 66a). Upon questioning by the court, the two jurors individually answered that they understood they were not to be influenced by any account of the case not developed in the courtroom (R. 66a) and stated that they could render a verdict uninfluenced in any way by the newspaper articles (R. 66a–67a). The jurors as a group then indicated that they would not be influenced by the matter (R. 67a). The court instructed the jury that it must decide the case solely on the basis of the evidence adduced in the courtroom and advised the jurors to refrain from reading any accounts of the trial until the case was finally

determined (R. 67a). Petitioner's motion for a mistrial was denied (R, 68a). A later motion for a new trial was similarly denied with an opinion holding that the articles in question were not so inflammatory or prejudicial as to deprive the two jurors of their ability to follow the instructions (R. 181a–182a).

ARGUMENT

1. The trial court did not abuse its discretion in precluding a collateral inquiry designed to impeach the credibility of James by a comparison of his income and expenditures.[3] The limits to be set on cross-examination as to such matters are within the sound discretion of the trial court (*Glasser* v. *United States,* 315 U.S. 60, 83), and that discretion is not abused by precluding inquiry into a police officer's financial transactions. *Mays* v. *United States,* 261 F. 2d 662, 665 (C.A. 8). A tabulation of James' financial transactions here could have occasioned considerable delay in the course of the trial before any meaningful conclusion could have been drawn as to whether there was any unexplained source of income. Even then, the nature of that source would have remained a matter of speculation. Petitioner could have interrogated James directly concerning any unreported bribe payments, leaving the answers for the evaluation of

[3] Petitioner suggests that the inquiry could also have demonstrated a motive to testify falsely. Even if the inquiry could have shown unreported bribe payments by petitioner and others, however, there is no reason why these unreported payments would have motivated James to falsify the existence or nature of the reported payments involved in this case.

the jury, and considerable cross-examination of James was, in fact, allowed (R. 68a–159a). As the restriction on cross-examination was not improper, the restriction on the introduction of extrinsic evidence to show the possibility of misconduct was plainly not reversible error.

2. There is no merit to petitioner's contention that the government was obligated to prove, as part of its case in chief, that no wagering tax return had been filed by petitioner's partner, Katz. Although persons doing business in copartnership are required to pay but one special tax between them (26 U.S.C. 4902), the single return filed on behalf of the partnership must list the names and addresses of all members it is intended to cover (26 C.F.R. 44.4902–1). The government established that no return had been filed listing petitioner's name (R. 9a–11a). If a return had been filed by Katz individually, which was meant but not designated as a partnership return, this would certainly be, at most, a matter of defense for petitioner. See *United States* v. *Clancy*, 276 F. 2d 617, 635 (C.A. 7), reversed on other grounds, 365 U.S. 312. Here Katz, in fact, had filed no such return, and petitioner does not suggest otherwise.

3. The trial court did not abuse its discretion in determining that no mistrial was necessitated by the exposure of two jurors to newspaper accounts of the case. The court adequately instructed the jurors not to consider the matter, the jurors assured the court that they would not, and the two aspects of the articles

condemned by petitioner (his alleged occupation and Katz' prior conviction) were not so inflammatory as to destroy the jurors' ability to render a fair verdict. The reference to petitioner as a numbers operator was a pale reflection of the testimony disclosing petitioner's express admissions to James, and the information that "Katz was convicted last June on gambling charges and has appealed for a new trial" (R. 174a) must be viewed in light of the cross-examination of James by petitioner's counsel, who voluntarily asked about "the trial of Henry Katz in this court in June of this year" (R. 70a; see also R. 72a, 74a) and about a 1958 state case in which "Mr. Stupak and Mr. Katz were on trial" (R. 80a; see also R. 84a, 88a, 115a, 140a).[4] Newspaper divulgence of a co-defendant's admitted guilt will not necessarily require a new trial (*United States* v. *Crosby*, 294 F. 2d 928, 950 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States* 368 U.S. 984), and the present circumstances present a much smaller chance of prejudice. The trial judge has a "large discretion in ruling on the issue of prejudice," *Marshall* v. *United States*, 360 U.S. 310, 312. That discretion was not abused.

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[4] James was cross-examined extensively about his testimony in the two earlier cases (R. 60a–75a, 80a–96a, 115a–116a, 140a–144a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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